

August 22, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Via FCC's Electronic Comment Filing System

Re: Proceeding Number 02-278

Dear Ms. Dortch:

The National Council of Nonprofit Associations (NCNA) is a 501(c)(3) membership-based organization with a mission to advance the vital role and capacity of the nonprofit sector in civil society and support and give voice to state and regional associations of nonprofit organizations. As a credible voice and champion for the nonprofit sector, NCNA represents a network of 39 state and regional associations of nonprofits serving over 22,000 charities nationally. NCNA supports state associations by building their capacity to serve nonprofits at the state and regional level and remain informed of federal and state level policy issues affecting the nonprofit sector. The support provided by NCNA to state associations of nonprofits helps nonprofits receive cutting edge training and technical assistance, advocate for sound public policies at the state and national levels, and promote the merits and impact of nonprofits broadly.

At the national level, NCNA monitors issues that have broad implications for the nonprofit sector, particularly in the legislative and regulatory environment. One issue we are currently addressing is the Federal Communications Commission's (FCC) do-not-fax rules. As we began informing our members and others in the nonprofit community about the application of the rules, it became quickly apparent that there was confusion about, and lack of clarity in, the scope of the rules. Specifically, the nonprofit sector was not aware of the new rules. As we tried to explain to nonprofits how they should implement the rules, we found

that many questions remain unanswered (*i.e.*, definition of an “unsolicited fax advertisement,” scope of the “established business relationship,” etc.). In order for organizations to properly comply with the new rules, they needed much more guidance and advice on how to change their practices to be in compliance. Because of this, NCNA requests a stay of the portion of the Report and Order that deals with the do-not-fax rules. We acknowledge and appreciate FCC’s recent action to postpone the implementation of the elimination of the “established business relationship” (EBR) exception to the do-not-fax rules and the requirement of obtaining signed, written consent prior to sending an unsolicited fax.

NCNA believes that a stay is appropriate and necessary to allow greater input and outreach to and from the nonprofit community. This postponement period provides an opportunity for us to offer specific suggestions to the FCC based on numerous conversations we have had with our members and those our members have had as they transmitted information to their members (local and community based organizations).

Penalties

At the outset, we are very concerned about the penalties that may be imposed on those organizations least able to afford the fines. According to the existing rules, organizations may be subject to fines for simple clerical errors or other unintended errors due to the vagueness in the rules and lack of existing guidance from the regulatory agency.

Established business relationship

The EBR deals with commercial relationships between the sender of the fax and the recipient. The relationship between nonprofits and its varied constituents often do not easily fall within such a narrow definition.

The language of the EBR definition in Paragraph 113 of the July 3 Report and Order refers to a residential subscriber’s relation with a commercial entity. One of the tax exempt purposes of many nonprofits is to provide information or technical assistance to the public, often without charge. Does a contact, initiated by a member of the public or another organization, seeking information or assistance from the nonprofit organization, give rise to a “business relationship” when the provision of such information or assistance is a regular function of the nonprofit organization, and the information or assistance is provided without charge? If it does, in the terms of the discussion in Paragraph 113, does this constitute a “transaction” or an “inquiry”?

Unsolicited advertisement

An unsolicited fax advertisement is defined as the “commercial availability or quality of any property, goods, or services.” In this context, this is ambiguous and vague. Clarification is needed as to what fits within that definition. For instance,

- Does a charitable solicitation fit within the definition? Assuming, as we do, that it would not, at what point (if any) would a request for a contribution become an “advertisement” by virtue of the inclusion of an offer of some item or service in return for the contribution? The issue is significant because often the item offered in return is of merely symbolic or nominal value, such that the communication is not an announcement or promotion of the item’s “commercial availability”?
- Do “save the date” notices for a conference or workshop cause a fax to be covered by these rules?
- Is consent needed to fax information about free programs, such as seminars or workshops? If not, but if the nonprofit hosting or conducting the program has other materials on site that may promote membership or its other services, do these or similar factors “taint” the initial announcement of the free program?
- How do you distinguish between an invitation and an advertisement?
- Are press releases about potentially newsworthy activities, faxed to media contacts or others for the purpose of publication or re-publication, brought within the scope of “unsolicited advertisements” if in whole or in part the event or activity announced involves a program, service, or product for which a fee is charged?
- Is a request for a donation to a political action committee (PAC) covered?

Consent

In addition to requiring guidance about what constitutes an unsolicited fax advertisement,” questions abound about the scope of the consent requirement.

- Who in an organization or other entity can give consent or withdraw consent for a business fax number?
- Is the consent withdrawn when the person within an organization leaves?
- Do you need to obtain consent from every individual at an organization or entity?
- If you obtain written consent as part of the membership application, does consent still apply even after membership expires or is cancelled?
- When is a consent no longer valid?

- Can a national organization obtain consent for its chapters or local affiliates or for-profit subsidiaries?

Government agencies or instrumentalities

Are agencies or instrumentalities of state or local governments “persons” subject to these regulations? Assuming that governmental entities are exempt from these restrictions, is there a definition or has there been an interpretation as to what constitutes an exempt governmental “entity”?

The comments noted above are just a few of the comments we have received from our members as we talk with them about the new rules. No doubt as we move further down the road toward implementation, other questions will arise. But in the meantime, answers or clarification to the questions noted above must be addressed if the new rules are to be followed. Given that financial fines are involved, it is in the best interest of the FCC and the impacted organizations for there to be clear definitions and consistent answers to these questions and a deeper understanding of how organizations operate.

NCNA appreciates this opportunity to provide its perspective and looks forward to working with you in addressing the concerns raised in this letter. Please do not hesitate to contact me or Abby Levine, NCNA’s Public Policy Analyst.

Sincerely,

/s/ Audrey R. Alvarado
Executive Director

cc: Mr. Leslie Smith, Federal Communications Commission (via email)